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No. 01-123

In the Supreme Court of the United States

JSG TRADING CORPORATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 2(4) of the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. 499b(4), makes it unlawful for "any commission merchant, dealer, or broker * * * to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such [produce] transaction." The question presented in this case is as follows:

Whether a produce seller that offers consideration to a buyer's agent or employee, without the knowledge of the principal or employer, and with intent to induce purchase of the seller's product, breaches a duty under Section 2(4) not to corrupt the buyer's agents and employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 235 F.3d 608. The opinion of the Judicial Officer of the United States Department of Agriculture (Pet. App. 16a-82a) is reported at 58 Agric. Dec. 1041. A prior opinion of the court of appeals is reported at 176 F.3d 536. A prior opinion of the Judicial Officer is reported at 57 Agric. Dec. 640. The opinion of the administrative law judge is reported at 56 Agric. Dec. 1800.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2001. A petition for rehearing was denied on March 22, 2001 (Pet. App. 83a). On May 21, 2001, the Chief Justice granted an extension of time within which

to file a petition for a writ of certiorari to and including July 20, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Perishable Agricultural Commodities Act (PACA) was enacted in 1930 "for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous." S. Rep. No. 2507, 84th Cong., 2d Sess. 3 (1956). The PACA requires all buyers and sellers of large quantities of perishable goods to have a license issued by the Secretary of Agriculture. See 7 U.S.C. 499c.

Section 2 of the PACA prohibits certain trade practices deemed unfair or deceptive. See 7 U.S.C. 499b. If the Secretary of Agriculture finds that a merchant, dealer, or broker has violated one of the provisions of Section 2, the Secretary may suspend the offender's license or, if the violation is "flagrant or repeated," revoke the license. See 7 U.S.C. 499h(a).

In pertinent part, Section 2(4) provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> * * *
>
> (4) [f]or any commission merchant, dealer, or broker * * * to fail, without reasonable cause, to perform any specification or duty, express or

> implied, arising out of any undertaking in connection with any such transaction.

7 U.S.C. 499b(4); see also 7 C.F.R. 46.26. As a result of an amendment enacted in 1995, Section 2(4) further provides: "However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter."

The United States Department of Agriculture (USDA) has interpreted Section 2(4) to prohibit a seller of agricultural goods from corrupting the agent of a buyer. The USDA considers that duty to have been breached "when a seller offers consideration to a buyer's agent or employee, without the knowledge of the principal or employer, with intent to induce purchase of the seller's product." Pet. App. 2a. The USDA has characterized such conduct as "commercial bribery." *Ibid.*; see *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1182-1189 (1990), aff'd, 945 F.2d 398 (4th Cir. 1991) (Table), cert. denied, 503 U.S. 970 (1992); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 882-887 (1991), aff'd, 953 F.2d 639 (4th Cir.) (Table), cert. denied, 506 U.S. 826 (1992).

2. Petitioner JSG Trading Corporation is a New Jersey corporation, licensed under the PACA since 1988, that was engaged in the business of buying and selling produce. The charges in this case arose from petitioner's relationship with agents of two tomato purchasers, L&P Fruit Corporation (L&P) and American Banana Co., Inc. (American Banana). Anthony and Gloria Gentile were purchasing agents for L&P; Albert Lomoriello was a purchasing agent for American Banana. In January 1993, the USDA commenced an investigation that led to the filing of a complaint against

petitioner, the Gentiles, and Mr. Lomoriello. The complaint alleged that petitioner had made unlawful payments to the Gentiles and Mr. Lomoriello to induce them to purchase tomatoes from petitioner, in violation of Section 2(4) of the PACA. Pet. App. 3a.

After a hearing, an administrative law judge (ALJ) found that petitioner had engaged in seven transactions with the Gentiles and Mr. Lomoriello that constituted "commercial bribery" and therefore violated Section 2(4). 56 Agric. Dec. 1800, 1813 (1997). The ALJ found that petitioner had (1) sold a boat to Mr. Gentile for a fraction of its value; (2) paid in part for the lease of a Mercedes for Mr. Gentile; (3) given Mr. Gentile a $3000 Rolex watch; (4) overpaid Mrs. Gentile by at least $33,000 on the purchase of shares of JSG stock and paid $5600 to G&T Enterprises (G&T), a corporation controlled by Mrs. Gentile; (5) issued 35 checks to Mr. Gentile totalling $62,535.60; (6) made several unjustified payments to Mrs. Gentile; and (7) issued seven unjustified checks to Mr. Lomoriello totaling $9733.45. See *id.* at 1816-1822, 1831-1832; see also Pet. App. 3a-5a. Finally, the ALJ determined that the violations were flagrant and repeated, and it ordered that petitioner's license be revoked. 56 Agric. Dec. at 1837.

Petitioner appealed to the Judicial Officer of the USDA, who is the final deciding officer in the USDA's administrative process. See 7 C.F.R. 1.132, 2.35. The Judicial Officer adopted, with minor changes, the decision of the ALJ. 57 Agric. Dec. 640 (1998).

3. The United States Court of Appeals for the District of Columbia Circuit granted petitioner's petition for review and remanded the case to the USDA for further proceedings. *JSG Trading Corp.* v. *USDA*, 176 F.3d 536 (1999) (*JSG I*). The court explained that the Judicial Officer had "applied a *per se* test, which deems

illegal any payment above a *de minimis* level from a produce dealer to a purchasing agent, regardless of whether there is any secrecy or intent to induce." *Id.* at 543. The court found that the Judicial Officer had thereby deviated without explanation from the standard used in prior agency decisions to determine whether particular payments constitute "commercial bribery." Those decisions had required a showing that a payment was made with the intent to induce the agent to make a purchase, and that the payment was made without the knowledge of the agent's principal. *Id.* at 543-544. The court remanded the case to the agency either to apply the traditional standard or to explain its justification for applying a new standard. *Id.* at 544-546.

4. On remand, the Judicial Officer applied the agency's traditional standard for commercial bribery, which he described as requiring

> [p]roof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

Pet. App. 28a. The Judicial Officer found that three of the payments to Mr. Gentile—the lease of the Mercedes, the sale of the boat for less than its value, and the gift of the Rolex watch—were not violations of the PACA because they were not intended to induce Mr.

Gentile to purchase from petitioner. *Id.* at 43a. The Judicial Officer concluded, however, that the 35 checks to Mr. Gentile, the payments to Mrs. Gentile and to G&T, the stock purchase from Mrs. Gentile, and the checks to Mr. Lomoriello were all acts of "commercial bribery." See *id.* at 43a-82a. The Judicial Officer again found that the violations of Section 2(4) were repeated and flagrant, and he ordered that petitioner's license be revoked. *Id.* at 82a.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-15a. The court held that the Judicial Officer's decision was supported by substantial evidence and that the Judicial Officer had reasonable grounds for rejecting petitioner's proffered explanations for most of the payments in question. *Id.* at 3a-5a.[1] The court further held that the legal standard applied by the Judicial Officer on remand was consistent both with agency precedent and with the court's opinion on the prior petition for review. *Id.* at 5a-11a. The court explained in particular that neither the USDA's prior decisions nor the court's earlier opinion "require[d] a *quid pro quo* arrangement between the payer and the payee." *Id.* at 9a; see *id.* at 9a-11a. The court stated that "[t]he federal cases requiring a *quid pro quo* that [petitioner] cites do not persuade us otherwise, for they interpret federal criminal bribery statutes containing entirely different language than PACA." *Id.* at 10a. The court held that while a *quid*

[1] The court of appeals did express doubt as to whether the $5600 check to G&T was an instance of commercial bribery. Pet. App. 5a. The court stated, however, that it "[could] not see how the $5,600 payment could affect the outcome of this case. The remaining payments to Mr. and Mrs. Gentile and Mr. Lomoriello amply support revocation of [petitioner's] PACA license." *Ibid.*

pro quo requirement would be an acceptable means of distinguishing between bribes and legitimate transactions, the secrecy and intent elements of the traditional test adequately served the same purpose. *Id.* at 10a-11a. The court also stated, however, that it "agree[d]" with the Judicial Officer's finding "that [petitioner's] per-box payment scheme constituted a *quid pro quo*." *Id.* at 9a n.7.

The court of appeals observed as well that "[t]he essence of the commercial bribery offense * * * is the corruption or attempted corruption by the produce seller of its buyer's agent or employee. So framed, it does not cover payments made to an employer or principal." Pet. App. 11a-12a. The court therefore acknowledged that "[i]f Mr. Gentile and Mr. Lomoriello were principals in L&P and American Banana, then [petitioner] did not commit commercial bribery." *Id.* at 12a. The court "agree[d] with the Judicial Officer," however, that Mr. Gentile and Mr. Lomoriello were purchasing agents rather than principals. *Ibid.* Finally, the court of appeals held that the USDA's revocation of petitioner's license was a permissible sanction for petitioner's flagrant and repeated violations. *Id.* at 14a-15a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. In sustaining the revocation of petitioner's license in this case, the court of appeals did not sanction any departure from prior USDA precedent. When petitioner filed its first petition for review, the court remanded the case to the Judicial Officer with directions either to apply the standards articulated in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), aff'd, 945

F.2d 398 (4th Cir. 1991) (Table), cert. denied, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), aff'd, 953 F.2d 639 (4th Cir.) (Table), cert. denied, 506 U.S. 826 (1992), or to explain his reasons for employing different standards. See *JSG I*, 176 F.3d at 546. Under *Goodman* and *Tipco*, liability for "commercial bribery" requires proof that a payment or offer of payment was made to induce a purchasing agent to buy from the dealer, and that the payment was made without the knowledge of the purchasing agent's principal. *Goodman*, 49 Agric. Dec. at 1187; *Tipco*, 50 Agric. Dec. at 896, 899; see also Pet. App. 28a; *JSG I*, 176 F.3d at 542.

The Judicial Officer on remand articulated and applied the USDA's traditional standard for "commercial bribery" in a manner fully consistent with the relevant agency precedents. On the most recent petition for review, the court of appeals considered petitioner's contrary arguments and concluded that the test employed by the Judicial Officer on remand "is consistent with *Goodman* and *Tipco*." Pet. App. 7a. Because the court of appeals concluded that the agency adjudicator faithfully applied established legal rules, there is no basis for petitioner's prediction (Pet. 18-23) that the court's decision will cause disruption of agricultural markets or interference with established business practices.[2]

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[2] There is, in particular, no basis for petitioner's assumption (see Pet. 21) that under the court of appeals' opinion a produce customer must be informed of collateral fees and payments *before* the purchasing agent accepts them on the customer's behalf. To the contrary, the court's opinion reflects its understanding that the agency's conception of commercial bribery "does not cover payments made to an employer or a principal" because "payments made to the produce buyer itself, as opposed to its agents or

2. Petitioner argues (Pet. 15-23) that the court of appeals' decision "eviscerates" the 1995 amendments to the PACA, which allow certain good faith payments of collateral fees and expenses. That claim lacks merit.

In granting petitioner's earlier petition for review and remanding the case for further consideration by the agency, the court of appeals expressed concern that the *per se* test employed in the Judicial Officer's initial opinion in this case might be inconsistent with the 1995 amendments to the PACA. See *JSG I*, 176 F.3d at 546. The court noted that the test articulated in the Secretary's prior decisions had included two elements—intent to induce agents to buy from the payer, and failure to inform the purchasing agent's principal of the transactions—that helped separate improper bribes from legitimate transactions. See *id.* at 542. In denying the most recent petition for review, the court emphasized that "[t]he secrecy element in particular also distinguishes the transactions at issue from a category of promotional activities recognized as legitimate by" the 1995 amendments. Pet. App. 11a. The court explained that "[p]romotional allowances, rebates, and the like are typically given with the buyer's knowledge rather than secretly directed to the buyer's agents or employees," and that the payments at issue here "also lack the requisite good faith," since "[n]o reasonable conception of honesty or fair dealing includes secret payments designed to corrupt a produce buyer's agents or employees." *Ibid.*

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employees, do not possess the requisite secrecy." Pet. App. 11a-12a. Payments made to the customer itself would not be covered by the *Goodman/Tipco* rule, even if the agent consummates the transaction before those payments are brought to the principal's attention.

Petitioner contends (Pet. 16-17) that "there is no basis in PACA or its regulations to conclude that the employer's awareness has any relevance as to whether a particular payment is a collateral fee or expense." The more salient point, however, is that promotional allowances and rebates are typically given to the customer (though they may be accepted on the customer's behalf by its agent) rather than being directed to the agent for his personal use. In any event, the court of appeals correctly sustained the Judicial Officer's determination (see Pet. App. 78a) that the payments in question lacked the requisite "good faith." Petitioner is doubtless correct that "[e]fforts to induce someone to buy from one's own company, as opposed to one's competitors, cannot be said to be *per se* corrupt or in bad faith." Pet. 18. The typical method of "induc[ing] someone to buy from one's own company," however, is to offer incentives that make a transaction more favorable or attractive *to the customer*. Petitioner, by contrast, sought to achieve that objective by funneling surreptitious payments to agents who owed a duty of loyalty to the buyers. Petitioner offers no basis for believing that those payments comported with accepted standards of good faith business conduct, or that Congress intended the 1995 PACA amendments to legitimate such practices.

3. Petitioner contends (Pet. 23-26) that the court of appeals' decision in this case conflicts with this Court's holding in *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999). *Sun-Diamond* presented a question concerning the construction of 18 U.S.C. 201(c)(1)(A), which makes it a federal crime to give anything of value to a public official "for or because of any official act." See 526 U.S. at 401. This Court interpreted Section 201(c)(1)(A) to require the government to "prove a link

between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 414. Petitioner contends that the concept of "commercial bribery" developed by the USDA pursuant to the PACA must similarly be limited to payments linked to specific agricultural transactions. Petitioner's reliance on *Sun-Diamond* is misplaced.

As the court of appeals explained, *Sun-Diamond* is inapposite here because it interprets a federal criminal statute "containing entirely different language than PACA." Pet. App. 10a; see also *JSG I*, 176 F.3d at 545 (recognizing that "[g]iven the broad language of § 2(4) [of the PACA], the agency is not necessarily bound by traditional statutory definitions of commercial bribery"). The pertinent PACA provision makes it unlawful "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction [in interstate or foreign commerce]." 7 U.S.C. 499b(4). That language, which covers the breach of any duty "arising out of any undertaking in connection with any" covered transaction, is significantly broader than the provision at issue in *Sun-Diamond*. Moreover, although the Court in *Sun-Diamond* characterized its interpretation of Section 201(c)(1)(A) as the "more natural reading" of the statutory language, 526 U.S. at 412, it did not hold that the text of the relevant provision *compelled* that reading. Construction of the relevant PACA provision, unlike the interpretation of a federal criminal prohibition, is primarily entrusted to the USDA rather than the courts. As the court of appeals recognized, judicial review in this context "is limited to ensuring that the Department's construction of PACA is reasonable and that the Department either follows its prior constructions of the statute or

articulates a reasoned justification for departing." Pet. App. 10a n.8.[3]

The instant case is in any event an unsuitable vehicle for resolving the question whether Section 499b(4) requires proof of a *quid pro quo* as an element of "commercial bribery." The Judicial Officer explained that "[e]ven if I found that the elements of traditional commercial bribery * * * include the existence of a *quid pro quo* agreement, I would find that [petitioner] engaged in activity that meets the traditional test for commercial bribery." Pet. App. 76a. The Judicial

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[3] Petitioner is also wrong in suggesting (Pet. 26-27) that the Judicial Officer departed from a prior agency practice of defining the duties owed under 7 U.S.C. 499b(4) by reference to state law. The agency decisions on which petitioner relies simply make clear that the USDA will look to existing bodies of law, including state law, in resolving questions of contract interpretation that arise in matters committed to the agency's jurisdiction. See *Rich-Seapak Corp.* v. *Pro-Ag, Inc.*, 56 Agric. Dec. 1958, 1965-1966 (1997) (looking to the Uniform Commercial Code (UCC) for guidance on construing a supply contract); *Flanagan & Jones, Inc.* v. *World Wide Consultants, Inc.*, 53 Agric. Dec. 828, 858 n.22 (1994) (applying the UCC's method for measuring damages); *In re Salinas Lettuce Farmers Coop.*, 50 Agric. Dec. 984, 989 n.8 (1991) (using the UCC's definition of "commercial unit"). Those cases do not, however, establish any overarching principle that questions arising under Section 499b(4) must always be resolved by reference to state law. And petitioner does not contend that the agency has previously defined the scope of "commercial bribery" by borrowing the law of a particular State. To the contrary, the traditional elements of "commercial bribery" in this context, as described by the court of appeals both in *JSG I* and on the most recent petition for review, do not involve an inquiry into the law of any particular State. See 176 F.3d at 542 ("It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy."); Pet. App. 5a (referring to "*Goodman's* and *Tipco's* intent-to-induce and secrecy standard").

Officer found "substantial evidence that many of these payments were directly dependent on the number of boxes of tomatoes that Messrs. Gentile and Lomoriello purchased from [petitioner]," and he inferred from that fact that "[petitioner] and Mr. Gentile and [petitioner] and Mr. Lomoriello had *quid pro quo* agreements in which, in exchange for [petitioner's] payments, Messrs. Gentile and Lomoriello agreed to purchase tomatoes from [petitioner]." *Id.* at 77a. The court of appeals "agree[d] that [petitioner's] per-box payment scheme constituted a *quid pro quo*," while noting that its "decision does not turn on this fact." *Id.* at 9a n.7. There is consequently no reason to believe that either the Judicial Officer or the court of appeals would have resolved this case differently if a *quid pro quo* requirement were incorporated into the test for determining whether particular payments constitute proscribed "commercial bribery."

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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